INTERPRETATION OF THE COMMON LAW IN ACTIONS UNDER FEDERAL EMPLOYERS' LIABILITY ACT.*

It is, of course, thoroughly settled that the decisions of the Supreme Court of the United States, construing Federal Statutes, are binding upon the State Courts, and their being followed in all cases is insured by Section 237 of the Judicial Code, which vests that Court with appellate jurisdiction in all actions begun in the State Courts where any right, privilege or immunity is claimed under any statute of the United States and the decision of the State Court of last resort is adverse to such claim.

In such appeals, however, the Supreme Court is not one of general review, but has only jurisdiction of the federal question presented. Inasmuch, therefore, as the State Courts are not subordinate or inferior tribunals as to questions of a non-federal nature, even though they may arise in cases of which the United States Supreme Court has appellate jurisdiction, they have the power to decide those questions for themselves without regard to the principles of law which the Supreme Court may have announced in the exercise of its broader and more comprehensive jurisdiction in appeals from the lower Federal Courts in which such non-federal questions may have been considered.

A proper test, therefore, of the question whether the State Courts in action under the Federal Employers' Liability Act are bound by the decisions of the Federal Courts defining and applying the rules of "negligence," "last clear chance," etc., is whether such questions are federal in their nature and will be investigated by the Supreme Court of the United States on appeal from the State Courts. If they are subject to review on appeal, the State Courts are as to them subordinate tribunals, and must follow the rulings of the Supreme Court as the court of last resort.

On the one hand, it might be argued that when Congress

*The question set forth in the title is very ably argued in two articles appearing in this month's issue of *The Memorandum*, a paper published by the Law Department of the Southern Railway Co., and for the benefit of the bench and bar of this state we are setting these articles out in full. The discussion is kindred to that in the preceding article.

prescribed the existence of "negligence" on the part of the carrier as a prerequisite to the right to recover in actions under the Employers' Liability Act, it vested the federal courts with the duty of construing and interpreting this term and of determining its statutory significance and effect. In this view, every question of the law of negligence arising in actions brought under the federal statute would be federal in its nature, because it would involve the construction of a law of the United States.

On the other hand, it may be said that when Congress used the word "negligence," it did so in its common law sense, and that because it possesses no special statutory significance rendering necessary its consideration, definition and application as a construction or interpretation of the statute, the negligence meant was common law negligence, and must be determined like other questions of common law, and the question is, therefore, non-federal and cannot be reviewed by the Supreme Court on appeal.

The latter view seems, with some important qualifications, to have been adopted by that tribunal, though the matter is in some aspects still far from clear.

In Seaboard Air Line R. Co. *v.* Duvall, 225 U. S. 477, it was pointed out that while the right of appeal existed from the State Court, the Supreme Court was not one of general review, and could, therefore, only consider the federal questions presented, and it was held that none of the requests for instructions called for any definite construction of the Employers' Liability Act, although they involved questions of the general law of negligence.

In St. Louis, Iron Mountain & Southern Ry. Co. *v.* McWhirter, 229 U. S. 265, it was said that there was no jurisdiction to consider merely incidental questions not federal in character· that is, which do not in their essence involve the question of the right in the plaintiff to recover under the statute or the converse; that is to say, the right of the defendant to be shielded under that statute because, when properly applied, no liability on its part from the statute would result. It was, therefore, held that the claim that the defendant was entitled to the direction of a verdict because there was no evidence tending to show negligence and the resultant liability, was in effect a claim of immunity under the statute, and the evidence would be examined to deter-

mine whether it was well founded and the verdict should have been directed.

In Southern Railway Co. *v.* Bennett, 233 U. S. 80, the Court expressed doubt as to whether ordinary questions of negligence were reviewable by it, and stated that where such questions were raised on appeal they would, if considered at all, be dealt with in a summary way.

In Seaboard Air Line *v.* Padgett, 236 U. S. 668, the rule announced in the McWhirter case was reaffirmed and the Court limited its consideration to "two assignments which are directly and specifically concerned with the interpretation of the statute," and the remaining seven, which "also raise questions of law under the statute, since they all in one form or another rest upon the contention that error was committed by the trial court in not taking the case from the jury and instructing a verdict for the defendant upon the assumption that there was no evidence sufficient to justify the submission of the case to the jury for its consideration."

Although in cases brought under the Employers' Liability Act in United States District Courts, which have concurrent jurisdiction thereof with the state courts, and appealed to the Supreme Court from a Circuit Court of Appeals, it is a court of general review, it has announced that it will not consider questions of the general law of negligence not involving an interpretation of the statute, unless it clearly appears that error has been committed. Seaboard Air Line R. Co. *v.* Moore, 228 U. S. 433; Chicago R. I. & Pac. R. Co. *v.* Brown, 229 U. S. 317; Southern Ry. Co. *v.* Gadd, 233 U. S. 572; Y. & M. V. R. Co. *v.* Wright, 235 U. S. 375. See also Chicago Junction R. Co. *v.* King, 222 U. S. 222, which is cited with approval in the above cases.

It has thus, even in cases brought from inferior federal courts, manifested extreme reluctance to consider questions of common law negligence, and has treated them as generally not interpretative of the statute.

It seems to be settled, therefore, that while the Supreme Court has reserved to itself the right to construe the Employers' Liability Act, like other federal statutes, it will not consider questions of the general law of negligence unless they involve a construction or interpretation of the statute.

In both the McWhirter and Padgett cases it was held, however, that where a peremptory instruction was asked for upon the ground that the testimony did not even tend to show negligence, the question thus raised involved a construction and interpretation of the statute, and that the evidence would be examined in order to see whether it made a case for the jury.

The question thus to be considered on appeal as to whether or not there was any evidence tending to show negligence, necessarily involves a consideration of the general law of negligence. In reviewing such cases, therefore, the Supreme Court will inevitably be called upon to lay down and apply from time to time general rules of the law of negligence, and having done so they must be followed by the state courts because they will have been announced by way of construction or interpretation of the federal statute.

It would also seem that in dealing with questions of a purely federal nature, which undoubtedly involve a construction of the statute, the Supreme Court will be called upon incidentally to announce general principles of the law of negligence. Thus, in Seaboard Air Line R. Co. *v.* Horton, 233 U. S. 492, the state court of first instance instructed the jury that an absolute duty rested upon the carrier to provide a reasonably safe place for the plaintiff to work and to furnish him with reasonably safe appliances, and that a failure to comply with this duty was ipso facto negligence. The Supreme Court held that Congress manifestly intended to predicate the right to recover in each case upon the existence of negligence, and announced the true common law rule to be that an employer is not a guarantor of the safety of the place of work or of the machinery and appliances, but that the extent of its duty to its employees is to see that ordinary care and prudence was exercised to the end that the place in which the work is to be performed and the tools and appliances of the work may be safe. It was also held that the statute left the common law rule as to assumption of risk in full force and effect except where federal statutes, such as the Safety Appliance Act, have been violated, and that at common law a servant assumed the risk of obvious dangers even though they arose from the negligence of his master. A question as to the common law rule of assumption of risk was thus decided, although there seems to be

no good reason why the determination of the common law relating to assumption of risk should involve a construction of the statute any more than that of the common law relating to negligence.

In Central of Vermont R. Co. *v.* White, 238 U. S. 507, the Supreme Court dealt with the common law rule as to contributory negligence, which it is to be noted is left in full force by the statute, except as to the result which follows when its existence has been determined by common law rules. It would seem, therefore, that the determination of what is contributory negligence requires a construction of the federal statute to precisely the same extent as the determination of questions of negligence. In this case the Supreme Court of Vermont declined to follow its own rule that under the common law the absence of contributory negligence must be affirmatively shown by the plaintiff and applied the decisions of the Federal Courts that the existence of contributory negligence is a matter of defense to be proved by the defendant. The Supreme Court upheld its action in this regard, and after citing a number of its prior decisions, used the following very significant language:

> "Congress, in passing the Federal Employers' Liability Act, evidently intended that the federal statutes should be construed in the light of these and other decisions of the Federal Courts."

Here is an express declaration that when Congress used the phrase "contributory negligence," it intended to integrate into it the prior federal decisions as to its common law significance, and thus to require that they be followed by the state courts in administering the law. If Congress used the phrase "contributory negligence," in the light of the prior federal decisions relating thereto, it would seem to follow necessarily that it also used the term "negligence" as construed, defined and applied by the Federal Courts prior to the enactment of the statute. This would seem to imply that the state courts must follow all of the decisions of the Supreme Court made prior to the enactment of the Employers' Liability Act on the law of negligence, inasmuch as Congress having legislated with reference thereto, they are in effect part of the statute.

In view of the various decisions heretofore alluded to, it seems that the Supreme Court has not intended to debar itself from the consideration and enunciation of general and fundamental principles of the law of negligence, but that in reviewing cases arising under the Employers' Liability Act it will decide only such questions of negligence as involve the construction of that statute. While the line of demarkation between those principles the elucidation of which do and do not require an interpretation of the statute is difficult to draw, whenever the Supreme Court, in accordance with the principles which it has announced, enters upon the discussion and decision of general questions of negligence, the state courts must necessarily acquiesce in its implied holding that such questions are open to review and are deemed to be constructive of the statute. The highest tribunal having said that it would decide only such questions as are thus interpretative, its decision of questions of negligence is likewise a decision that they come within the class of questions open to review; that is to say, that they involve the construction of the statute, and are, therefore, federal questions, and it is, of course, elementary that the decisions of the Supreme Court as to federal questions must be followed by the state courts.

It seems clear, therefore, that all decisions of the Supreme Courts in cases arising under the Federals' Liability Act are binding on the state courts, and if, as intimated in Central of Vermont Ry. Co. *v.* White, supra, Congress in enacting that statute must be held to have legislated with reference to the prior decisions of the highest Federal Court as to the law of negligence, it would follow that its decisions rendered prior to the enactment of the federal statute are likewise authoritative in the state courts.

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The exact question presented appears not to have been decided by the Supreme Court of the United States. However its opinion in the recent case of Central Vermont Ry. Company *v.* White, 238 U. S. 507, read in connection with its previous opinions in cases under the Act, indicates strongly that its decision will be in favor of the construction by the Federal courts of the common law rules governing the questions as applicable and binding

in the trial of cases under the Act in the courts of the States. While the Act abrogates the fellow servant rule of the common law and abolishes entirely the common law defense of contributory negligence and assumed risk in certain cases and allows contributory negligence in mitigation of damages and assumed risk as a complete defense in others, it leaves the questions of negligence, contributory negligence and assumed risk to be determined in any given case by the rules of the common law. If there could be any doubt about this from the terms of the Act itself, such doubt is removed by the Supreme Court of the United States in the case of Seaboard Air Line Railway Company *v.* Horton, 233 U. S. 492. The Federal courts have never felt bound to follow the decision of State courts in the determination or application of common law principles in the trial of cases arising within the States, but have always exercised an independent judgment in such matters. This is very forcibly brought out in the opinion in the case of Baltimore & Ohio Railroad Company *v.* Baugh, 149 U. S. 368. We all know that there is no greater wilderness of conflicting and irreconcilable decisions of the courts than those construing and applying the principles of common law applicable to the liability of the employer for personal injuries to the employee. It is now settled that in suits under the Act brought in State courts, by the pleadings and requests for proper instructions to the jury, based on the evidence, negligence, contributory negligence, assumed risk, last clear chance or subsequent negligence, proximate cause, and related subjects can all be made Federal questions open to review by the Supreme Court of the United States. (Seaboard Air Line R. Co. *v.* Padgett, 236 U. S. 668; Central Vermont R. Company *v.* White, 238 U. S. 507; Seaboard Air Line R. Co. *v.* Horton, 233 U. S. 492; St. Louis, etc., R. Co. *v.* McWhirter, 229 U. S. 265; St. Louis, etc., R. Co. *v.* Taylor, 210 U. S. 280, and authorities cited). It is unthinkable that the Supreme Court of the United States in such cases, with a long list of its own decisions construing the common law applicable, will abandon its own views and seek out those of the court of last resort of the State from which the case comes and by them determine whether the case should be affirmed or reversed. Such a course would only tend to confu-

sion and render impossible the uniform operation of the Act throughout all the States, evidently one of the main purposes of Congress in its passage.

After all it is the intention of Congress in adopting the Act, as such intention may be gathered of course from the language used, which must control the answer to the question presented In the Central of Vermont Railway case, the state courts of Vermont had refused, over the objection of the Railway Company, to apply to the case which was brought under the Act, the Vermont rule of general law which placed upon the plaintiff the burden of acquitting himself of contributory negligence. In the course of the opinion affirming the correctness of this ruling the Supreme Court of the United States says: "The United States courts have uniformly held that, as a matter of general law, the burden of proving contributory negligence is on the defendant. The Federal courts have enforced that principle even in trials in States which held that the burden is on the plaintiff. (Citing a number of cases). Congress in passing the Federal Employers' Liability Act evidently intended that the Federal statute should be construed in the light of these and other decisions of the federal courts. Such construction of the statute was, in effect, approved in Seaboard Air Line Railway Company *v.* Moore, 228 U. S. 434." If this is a correct statement, and no one will question it, then Congress evidently intended that the Act should be construed in the light of the decisions of the Federal Courts, construing and applying the common law applicable to the terms embraced in our question. In the Horton case brought under the Act in a State court of North Carolina the trial court framed his instructions to the jury on the state law governing the duty of the railway company in furnishing the plaintiff a safe and suitable appliance with which to work, and also on the state law governing assumed risk. On writ of error the Supreme Court of the United States held that the instructions on the duty of the railway company and also on the assumed risk of the plaintiff should have been framed on the common law governing these subjects rather than upon the state laws. It is true that in that case the state laws held inapplicable were statutes which changed the rules of the common law as construed by the decisions of the

Supreme Court of the United States, still it is not believed that the decision would have been different if the rules of the common law as construed by the federal decisions had been changed by the judicial instead of the legislative department of the State government.

The view here contended for is supported by a very strong opinion of Judge Trimble of the Kansas City Court of Appeals in the case of Cross *v.* Chicago, B. & Q. R. Company, 177 S. W. 1127. While bound to decide the case in accordance with the opposite view taken by the Supreme Court of Missouri in the case of Fish *v.* Railroad Company, 172 S. W. 340, the opinion successfully combats that view and its reasoning seems to me to be unanswerable. The dissenting opinion of Judge Brown of the Supreme Court of North Carolina in the case of Gray *v.* Southern Railway Company, 83 S. E. 849, very forcefully supports the same view. The decisions of the Supreme Court of Virginia in the case of Southern Railway Company *v.* Jacobs, 81 S. E. 99, and of the Texas Court of Civil Appeals in the case of Freeman *v.* Powell, 144 S. W. 1033, are in line with the opinion of the United States Supreme Court in the Horton case and are also very persuasive of the correctness of the view here advanced. The Supreme Court of Missouri is supported by the Court of Appeals of Kentucky in at least three cases. (Louisville & N. R. Co. *v.* Johnson, 171 S. W. 847; Helm *v.* C. N. O. & T. P. R. Co., 160 S. W. 945; C. N. O. & T. P. R. Co. *v.* Swan's Admrx., 169 S. W. 886); and apparently by the majority of the Supreme Court of North Carolina in the Gray case, already cited, and also by the Springfield Court of Appeals in the case of Hawkins *v.* St. Louis & S. F. R. Company, 174 S. W. 129.

The Supreme Court of Missouri in holding that the decision of the Supreme Court of the United States in the Horton case required the courts of the several States, in passing on the defense of assumed risk, to apply as a standard the common law rule on that subject, says: "This points a plain pathway—that of the common law as adopted, interpreted, expounded and enforced in the respective States." Under the common law as construed by the Courts of Missouri the servant does not assume the risk of any dangers created by the negligence of the master, while

under the same law as construed by the Supreme Court of the United States in the Horton case, and authorities there cited, an entirely different rule applies. It would seem a sufficient answer to the view of the Missouri, Kentucky and North Carolina Courts to point out that under that view, if the Fish case had reached the United States Supreme Court on writ of error that Court would have had to apply the Missouri rule of assumed risk, whereas if the suit had been brought in the Federal Court, the federal rule would have governed. Or to put the matter another way under that view the plaintiff's right to recover would be made to depend on the selection of the forum rather than on any principles of law of general application.

When we consider the medley of conflicting decisions, state statutes and constitutional provisions which existed and the condition sought to be remedied, it is obvious that Congress intended the operation of the Act to be uniform and indeed this idea runs through the decisions construing it. It is equally obvious that this result cannot be obtained except by a uniform rule of decision covering every question of right which may be claimed under the Act, as distinguished from the remedy, and necessarily this rule must be the rule established by the Supreme Court of the United States, the court of last resort, whose decisions on questions arising under the Act are binding on all other courts both State and Federal. It is confidently believed that this is the view which will finally obtain.

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